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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

EVANGELIN MARIE MILLER

Petitioner

vs.

THE STATE BAR OF CALIFORNIA

Respondent

REPLY TO BRIEF IN OPPOSITION

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Table of Contents

I. The Partisan Role of the California Supreme Court Role Offends Due Process of Law 6

II. The Lack of Disclosure of the Non-Existence of a Real Court and Judge and of the $1,556.00 for Salaries and Benefits is So Substantial that the Judgment Should be Reversed for Lack of an Informed Consent 13

Conclusion 19

Table of Authorities

Cases

Aetna Life Insurance Company v. La Voie 475 U.S 813, 89 L. Ed. 823, 106 S. Ct. 1580 (1988).....3,13
In the Matter of Ross 656 P.2d.832, 99 Nev. 1 (Nev. 1983)..12
Keller v. State Bar of California __U.S.__, 110 S. Ct. 2228, 110 L.Ed 2d. 1 (1990), overruling 255 Cal. Rptr. 542 (1989), section 6086.5, 6079.1(a)(c).....6
Liljeberg v. Health Services Acquisition Corp. 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d. 855 (1988).....8
United States v. Wunderlich 342 U.S. 98, 103, 72 S. Ct. 154, 157, 96 L. Ed. 113 (1951).....13

California Business and Professions Code

Section 6040.....8
Section 6043.....8
Section 6044.....8
Section 6079.1.....8,10,12
Section 6079.1(a).....6, 8,12
Section 6079.1(c).....8,9,12
Section 6079.1(d).....6,9,11
Section 6079.5.....12
Section 6086.5.....7,12
Section 6068.10.....12,14
Section 6086.10(b)(3).....11
Section 6086.10(d).....10
Section 6086.13.....11
Section 6086.65.....6,12
Section 6090.....8
Section 6092.5.....8
Section 6140.7.....15

Books

H. Simon, Administrative Behavior 13-14 (1957).....13
W. Gellhorn and C. Byse, Administrative Law: Cases and Comments 881 (5th Ed. 1970).....13

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In reply to the Brief of Respondent in Opposition to the Petition for a Writ of Certiorari, Petitioner Attorney proffers that the admissions by the State Bar of California of its lack of disclosure of the material facts concerning its employment of the judges to its State Bar Court, its employment of the probation personnel, its creation, ownership, and maintenance of a State Bar Court wherein adjudications of guilt result in assessment of

the salaries and benefits of its employee judges, prosecutors, investigators, and probation personnel against each accused and additional funds for other State Bar programs and its lack of disclosure of its demand for $1,556.00, consisting of $473.00 for the salary of its employee judge of its State Bar Court, $309.00 for its prosecutor's salary and benefits, and $774.00 for the salary and benefits of its employee investigator, require that such unfair and deceptive practices not be condoned and that the judgment based on solely a stipulation to which consent was withdrawn prior to its approval by the California Supreme Court be reversed for lack of an informed consent. Petition, hereinafter "P":5. "Section(s)" refers to sections of the California Business and Professions Code.

The identification of the claimed costs sent by the State Bar six weeks after the stipulation was signed and one month after one of its "Judges" to its "State Bar Court" approved it for transmission and approval by the California Supreme Court is attached hereto as Appendix A-1-A-4.

Petitioner tenders 1) The absence of recusal rule, statute,

constitutional provision, case law to permit an aggrieved party to challenge a State Supreme Court Justice for cause implicates a denial of a meaningful opportunity to be heard in a meaningful manner concerning the due process right to a fair and impartial adjudicator, 2) the use by the California Supreme Court of a subjective recusal standard similar to that declared unconstitutional by this Court in **Aetna Life Insurance Company v. La Voie** 475 U.S. 813, 89 L. Ed. 823, 106 S. Ct. 1580 (1988) offends the Supremacy Clause and due process of law, 3) A State Supreme Court which appoints employees to a privately financed prosecuting party and by summarily denying all petitions of all accuseds, awards the other party monies to recoup the private salaries and benefits of its appointees and their co-employees and sums for other programs of their appointee's employer is occupying a dual role- one partisan for a party and one adjudicative. This provides a temptation for it to not hold the balance nice, clean, and true between the prosecuting party and the accused and offends due process of law, 4) When the assessment of the salaries and benefits of the California Supreme

Court's appointee to the prosecuting party ($473.00 for signing a stipulation when there are no proceedings), and for their appointee's co-employee prosecutor of $309.00 and for their appointee's co-employee investigator of $774.00 are claimed costs, when there are no costs for a stipulation which is executed without proceedings, and a claim salary and benefits is "costs" is never disclosed before, during, or after a stipulation is signed and approved by a State Bar employee and is never disclosed until after the time the prosecuting party's rules specify for setting aside the stipulation, does not the lack of disclosure that costs is not costs, but the salaries and benefits of the prosecuting party's co-employee prosecutors, investigators, and judges, such a lack of disclosure that the time to set aside a stipulation is tolled from the date the party receives the actual assessment of their salaries and benefits?, 5) When a stipulation provides that, "The Supreme Court must enter an order effectuating the terms and conditions of this stipulation before any stipulation for suspension, actual or stayed, will be effective," P: 3-4, may not a party withdraw her consent prior to approval by the California Supreme Court ?, 6)

Is not the lack of disclosure that costs are not costs, but the salaries and benefits of co-employee judges, prosecutors, and investigators, whose mutual private employment relationship and financial interest in the proceedings is never disclosed, such a material omission of substantial facts that a stipulation induced by such a lack of disclosure must be voided for lack of an informed consent?, 5) When a privately financed party runs and owns its own private court financed, in part, from the funds imposed by finding all accuseds guilty, and it never discloses the "Court" it claims exists is owned, run, managed, and staffed by its private employee judges, investigators, prosecutors, probation personnel and fueled by funds obtained by finding all accuseds guilty, is not this material omission of substantial facts such a lack of disclosure that a stipulation induced by such a lack of disclosure must be voided for lack of an informed consent? 6) When a party which makes its own law for its private court changes the law relied on after a stipulation is signed but before it is approved by the constitutional court by abolishing the remedy available to contest it assessing its employee judges, investigators, and

prosecutors' salaries and benefits upon an accused as claimed "costs," does not such a change in the law require that a party's consent to the stipulation be permitted to be withdrawn and the judgment reversed?

I.

The Partisan Role of the California Supreme Court Role Offends Due Process of Law

This Court in **Keller v. State Bar of California** __U.S.__, 110 S. Ct. 2228, 110 L.Ed 2d. 1 (1990), overruling 255 Cal. Rptr. 542 (1989), reversed the decision of the California Supreme Court holding that the State Bar of California was akin to a governmental entity. This Court was unaware that the California Supreme Court issued that ruling after it had agreed with the State Bar of California to create its employees into a court to license the State's attorneys in order to alleviate the workload of the California Supreme Court. Refer P. Appendix B-1, and sections 6079.1(a)(d) and 6086.65. Pursuant to that agreement, the California Supreme Court ruled the State Bar was a governmental entity. This cleared the way for the State Bar employees to become a court with judges selected, hired and paid

by the State Bar and appointed by the California Supreme Court to become the licensing "Court."

Had this court been aware of the undisclosed partisan role of the California Supreme Court in having already agreed to appoint and oversee employees to the State Bar to be judges to its "State Bar Court" to license the state's attorneys, the unusual ruling it made claiming the State Bar was a governmental entity would have been seen in its undisclosed, but partisan light. By the time this Court held the State Bar was not a governmental entity, the California Supreme Court had already created its appointees to the State Bar into the private, partisan, and financially interested attorney licensing court and delegated its judicial power to disbar and suspend the State's attorneys to them while authorizing them to collect their salaries and benefits and those of their co-employees and to obtain funds for other programs of their State Bar employer by finding each accused attorney guilty. While this Court held the State Bar was not a governmental entity, the California Supreme Court had already created its employees appointed by it into a Court. Appendix B-

1-B-2 to Petition and sections 6086.5, 6079.1(a)(c).

The State Bar suggests that a State Supreme Court Justice is disqualified under this Court's **Aetna, supra**, decision only if he has a "direct, personal, substantial, pecuniary interest." Brief in Opposition, hereinafter "BO":14. Petitioner submits this does not define nor limit the principal. An adjudicator with an extrajudicial relationship with a financial beneficiary of its orders is just as tempted not to hold the balance nice, clean, and true as one who financially benefits himself from a ruling. **Liljeberg v. Health Services Acquisition Corp**. 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d. 855 (1988).

The act of appointing nine employees to the State Bar, when, the State Bar has the statutory authority to prosecute attorney disciplinary proceedings (sections 6040, 6043, 6044, 6090, 6092.5) involves the Justices of the California Supreme Court appointing employees to a privately financed party who require a minimum of $125,000 each annually for their base salaries. P Appendix B-1, sections 6079.1, 6086.65. It involves appointees who must be paid by the prosecuting party from its

private funds: "... the board [of the State Bar] shall fix and pay [them] reasonable compensation and expenses and provide adequate supporting staff and facilities." P. Appendix B-1 and section 6079.1(d). It involves appointees who are housed, trained, paid, provided their retirement, medical, dental plans, bonuses, annuities and profit sharing plans by the prosecuting party who also selects them, since all other persons are excluded from providing any input in the selection process to the California Supreme Court. P. Appendix B-1, sections 6079.1(c). 6079.10. It involves the only constitutional court awarding costs, which are not disclosed to be "costs," but which are the salaries and benefits of its appointee ($473.00 for signing a stipulation without any proceedings), and its appointee's co-employee prosecutor ($309.00), and their mutual co-employee investigator ($774.00) from the accused for a simple stipulation and additional sums for their salaries and benefits on a time expended basis, by denying all petitions of all accuseds since 1989, taking each accused's license to practice law, and preventing access to a disinterested court to over 3,091 attorneys whose licenses have been taken in less than

four and half years for a net financial benefit of in excess of fourteen million dollars for its appointees and their employer. Appendix A-1-A-4, P:8.

Whether these sums, as claimed by the State Bar, are less than one percent of its annual revenues, is irrelevant. BO:17, ft. 5. The incentive to find guilt, where none exists, is engendered by the existence of the financial motivation to recoup the salaries and benefits of its appointees to a party by just denying all petitions of all accuseds. Since its appointees would not risk being fired by their prosecuting party employer by finding an accused innocent wherein such an attorney might collect his reasonable expenses of defending from their employer and deplete its funds, rather than make money for it, it is a foregone conclusion that every attorney has been automatically found guilty since 1989 and all petitions of all accuseds have been automatically denied by the California Supreme Court since 1991, each such denial containing an order for the accused to pay its appointees' employer. P:7-8; P. Appendix B-1-B-2, sections 6079.1, 6086.10(d). That the Petitioner, an attorney with no

record for twenty three years who is an expert in Estate Planning, was induced to stipulate to a guilt she did not have and which could not be found by an impartial tribunal was in reliance that no monies would be demanded and that probation would be easily fulfilled and monitored by an impartial court and probation department. Those representations of the State Bar are false.

Similar to the case of a Board of a Bar Association who adjudicates guilt of attorneys in order to recoup the investigative costs of the Association, the State Bar's judges adjudicate guilt to obtain monies to recoup their and their co-employee prosecutors' and investigators' salaries and benefits for their State Bar employer and do so in order to keep their jobs and in order to obtain funds to distribute in their role for their employer in distributing funds to the Public in its Client Security Fund. P. Appendix B-1-B-2, sections 6086.10(b)(3), 6079.1(d), 6086.13.

The California Supreme Court occupies an executive role for the prosecuting party and financial beneficiary by appointing and overseeing nine employees to it, who are preselected by the prosecuting party and who require over one million dollars a year

for their base salaries. Appendix B-1 and section 6079.1(c)(a). It recoups the salaries and benefits of its appointees, provides them housing, vacations, retirement plans, and awards monies for its appointees to use for their salaries and benefits and those of their co-employees and awards funds for them to distribute to the Public in their role for their employer's Client Security Fund, by denying all petitions of all accuseds and letting their appointees find, as they have done, all accuseds guilty and taking or impairing each attorney's license to practice law. **In the Matter of Ross** 656 P.2d.832, 99 Nev. 1 (Nev. 1983). P. Appendix B-1, B-2 and sections 6079.5, 6086.5, 6079.1, 6086. 65, and 6086.10.

If a judge finds guilt so as to awards monies to reimburse the salary and benefits of his wife or business associate for the employer of his wife or business associate, under the State Bar's reasoning, the judge is not disqualified, because the judge does not have a direct, personal, substantial, pecuniary interest in the outcome. Appointing and overseeing the highest paid employees to a party and awarding their employer monies to pay them their salaries and benefits by adjudicating a case against the other party

appears to be as serious a conflict of interest as would be decision-making for the employer of a judge's wife or business associate. As stated by H. Simon, Administrative Behavior 13-14 (1957), quoted in W. Gellhorn and C. Byse, Administrative Law: Cases and Comments 881 (5th Ed. 1970), "the intangible effect of institutional loyalty must not be underestimated simply because it is difficult to quantify." As Justice Jackson said, "Men are more often bribed by their loyalties and ambitions than by money." **United States v. Wunderlich** 342 U.S. 98, 103, 72 S. Ct. 154, 157, 96 L. Ed. 113 (1951).

The Petition should be granted to determine what kind of a partisan role for a party and financial beneficiary a judge may occupy without offending the due process criteria set forth by this Court in **Aetna, supra.**

II.

The Lack of Disclosure of the Non-Existence of a Real Court and Judge and of the $1,556.00 for Salaries and Benefits is So Substantial that the Judgment Must be Reversed for Lack of an Informed Consent

The State Bar does not provide notice to an accused

attorney it is collecting its employee judges, prosecutors, investigators' and support staff's salaries, benefits, and perks as claimed "costs" as part of a stipulation or a guilty adjudication or that the State Bar Court and judges to it are not a Court or judges, but just State Bar hired employees, before it secures the stipulation or guilt adjudication and lets the period to set aside the stipulation or proceedings under its rules expire. P: 3-4. It is in no law, no rule, no public document. It is deliberately omitted from the State Bar's pre-printed stipulation which has as its claim that 'costs' for the Office of Trial Counsel is the most that may be imposed later. It never discloses, nor does the California Supreme Court, that its claim to 'costs' is not costs, but the actual costs and the salaries and benefits of the State Bar's employee judges appointed by the California Supreme Court, and their co-employee investigators, prosecutors, and other support staff on a time-expended basis. P:3-5. Appendix A-1- A-4.

The attorney signed a stipulation on August 12, 1994 which stated, "the agreed disposition is eligible for costs to be awarded to the State Bar. (Bus. & Prof. Code s. 6086.10 and

6140.7). Petitioner has been notified of his or her duty to pay costs. The amount of costs assessed by the Office of Trial Counsel will be disclosed in a separate cost certificate submitted following approval of this stipulation by a hearing judge. The amount of costs assessed by the State Bar Court will be disclosed in a separate cost certificate submitted upon finalization of this matter." P:4. One reading this would assume that the Office of Trials, the prosecuting unit of the State Bar, is going to itemize actual costs which are allowable and are limited to its out-of-pocket expenses. Since the stipulation is signed without any proceedings ever being commenced, the amount of such costs are zero. In fact, the actual costs the State Bar listed were zero. Refer Appendix A-1-A-4. But it claimed $1,556.00 for itself anyway. Appendix A-1.

Since a party must file a memorandum of costs within ten days of entry of a judgment under civil law, and the other party has ten days to move to tax those costs with a motion and a hearing before the judgment may become final, one would have assumed that following the State Bar's employee judge's

approval of the stipulation on September 29, 1994 that the Office of Trials was required to file its claimed costs by October 19, 1994. Appendix to Petition D-12-13. Instead it filed nothing. It waited until November 16, 1994 to simultaneously file its recommended pre-printed order for the California Supreme Court to sign approving the stipulation with its claim of "costs" of $1,556.00, all of which is salaries and benefits of its employee judges, investigators, prosecutors. P:4-5.

What is more disturbing is that the "Court" is also assessing its "costs." It demands for itself $473.00. Appendix B-3. Since when does a Court send out bills to parties to pay its costs? Appendix A-4. One might understand a court imposing sanctions after a notice and a hearing, but a Court *ex parte* sending out a demand to pay its costs is most unusual. What is even more unusual is that this Court is demanding $473.00 for itself for a "Level One" assessment of "Reasonable Costs of the Office of the State Bar Court." Appendix A-4. The "Level One" Assessment states that it is for a "stipulated disposition reached prior to filing of a Notice to Show Cause." Looking at the Level

Two, Three, and Four assessments on the form, the "Court's" assessments of its "costs" imposed on a party increase depending on the amount of time its employees spend on the case and when the disposition is reached with a separate category for "resignations of a member with charges pending" as the highest category of assessments of this "Court" listed. Appendix A-4.

This is the first indication to an attorney that something is not right about this Court which the attorney has been misled into believing in the stipulation and the conduct of the prosecutors and investigators and "judges" is a real court with a real judge. This "Court" is reimbursing itself for the time its judge and employees spend on a case for their salaries and benefits against just the accuseds. This " Court" even has a level of assessment system telling itself how much money to charge each accused for itself. The form makes clear that the prosecuting party never has to pay it. Its form is just to impose monies for itself against accuseds. How would a judge of this Court ever find an accused innocent if he can only impose his salary and benefits against accuseds and never the prosecutor or his

employer? Since 1989, when the California Supreme Court appointed these $125,000 a year "judges" to be employees of the prosecuting party, no "judge" of this State Bar Court has ever found an accused innocent. 3,091 licenses have been taken in less than four and a half years. Appendix A-5.

The State Bar "Court" awards itself more and more money as more time is spent on an accused's case by it. In sum, the more an attorney insists on his innocence, the more the "Court" is going to punish him by increasing the amount it assesses for itself as its "costs" against the accused." All of a sudden the attorney realizes the truth. This is no Court. This is no judge. The clause in the stipulation stating that, "The amount of costs assessed by the State Bar Court will be disclosed in a separate cost certificate submitted upon finalization of this matter," P:4, does not refer to the Court assessing the costs for the prosecuting party after the Office of Trials claims its costs **It refers to it assessing costs, which are its salaries and benefits, for itself!** (Emphasis added) The clause does not refer to this State Bar Court adjudicating fairly any claim of the Office

of Trials claiming its costs, but it filing and demanding its own costs with it and making sure its and their "costs" are their respective salaries and benefits imposed on each accused.

Two months after the stipulation is signed and one month after the "judge" to the "State Bar Court" approves the stipulation, the judge discloses he is not a judge, and there is no Court. P:3-5, Appendix A-4. He is an employee of the prosecuting party who is paid and employed by it and who awards himself or herself his salary and benefits and that of his co-employee prosecutors and investigators. Appendix A-1-A-4. The attorney realizes she has agreed to probation for two years and a non-existent guilt with a non-existent court, non-existent judges, and a non-existent probation department which is owned and run by the prosecuting party and which awards itself money for the salaries and benefits of its employee judges, prosecutors, investigators, and probation staff each time it finds an accused guilty. Appendix A-1-A-4.

CONCLUSION

Since there was no real court or judge in the State Bar

Court; the $1,556.00 "costs" was not disclosed until after the fifteen day period to set aside the stipulation within the party's "Court" had already expired; the "costs" are not costs, but the salaries and benefits of State Bar employee judges, investigators, and prosecutors; the prosecuting party changed the law relied on; Petitioner timely withdrew her consent prior to the stipulation's approval by the California Supreme Court and did so for good cause, the judgment approving the stipulation should be reversed for lack of an informed consent and a neutral adjudicator.

RESPECTFULLY SUBMITTED,

Dated: May 17, 1995

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